

## REPORTER'S NOTES TO APPELLATE RULE 6

Reporter's Notes – 2009

[The notes to the 2009 amendments were drafted by the Reporter for the Massachusetts Rules of Criminal Procedure]

This Rule was revised in 2009 to describe more fully the procedure for obtaining a stay of execution of a criminal sentence in an appellate court. It complements Rule 31 of the Rules of Criminal Procedure.

The 2009 amendment clarified the appellate process for stays of execution of a criminal sentence pending an appeal. As in civil cases, requests for a stay must first be presented to the trial court, unless such an application is not practicable. Either the defendant or the Commonwealth may seek relief from a single justice of the court that will hear the appeal concerning the trial judge's decision to deny, *e.g.*, *Commonwealth v. Aviles*, 422 Mass. 1008 (1996), or grant, *e.g.* *Commonwealth v. Hodge*, 380 Mass. 851 (1980), a stay. Only the parties may do so. *See Hagen v. Commonwealth*, 437 Mass. 374, 375 (2002) (crime victim lacks standing to request revocation of stay). In the ordinary course of events, for all but first-degree murder cases a single justice of the Appeals Court is the appropriate forum. The single justice does not review the decision of the trial judge, but considers the matter de novo. *See Commonwealth v. Allen*, 378 Mass. 489, 497 (1979).

Rule 6(b)(2) recognizes that it is important to give the Commonwealth adequate time to prepare a response to a motion for a stay, since that will often require substantial effort in addressing the merits of the underlying appeal.

After the single justice decides the issue, there is only one further step in the process: an appeal to the panel of the Appeals Court that will decide the merits, or the full bench of the Supreme Judicial Court if the case will be decided there. This changes prior practice, which allowed a party aggrieved by the decision of a single justice of the Appeals Court the option of seeking relief both by appealing the decision in that court and asking a single justice of the Supreme Judicial Court to entertain the matter. *See e.g.*, *Duong v. Commonwealth*, 434 Mass. 1006 (2001). The appeal from the decision of the single justice may be accompanied by a motion for an expedited ruling. *See e.g.*, *Restucci v. Commonwealth*, 442 Mass. 1045 (2004).

As also provided in Mass. R. Crim. P. 31, a stay of execution of sentence automatically expires when the appellate court considering the appeal releases a rescript affirming the conviction, unless the appellate court decides to extend it. A rescript is "released" when it is announced to the public and the appellate court notifies the parties that the court has decided the case. *Cf.* Mass. R. App. P. 23 (requiring the clerk of the appellate court to mail the parties a copy of the rescript and the opinion, if any). In the ordinary course of events, the rescript "issues" twenty-eight days following the release date or upon the denial of any petition for rehearing or application for further appellate review, whichever is later. *Id.*

When a rescript is released affirming a conviction, the clerk of the appellate court, in addition to the obligation that Mass. R. App. P. 23 imposes, shall notify the parties and the trial court clerk that the stay of execution of sentence has automatically expired. If the defendant wishes to apply for a new stay, in order to seek a rehearing or further appellate review, such a request should go to the appellate court that decided the case (either the panel of the Appeals Court or the full bench of the Supreme Judicial Court).

The court that decided the appeal may exercise its discretion to extend a stay of execution pending a petition for rehearing, application for further appellate review, or petition for certiorari. Unless otherwise specified, an extended stay expires when the rescript issues. The appellate court may act *sua sponte* or pursuant to the defendant's motion, which may be filed before the appeal is decided or after the rescript is released.

